

SERVICE DATE - JULY 19, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34098

RYMES HEATING OILS, INC.—PETITION FOR DECLARATORY ORDER

Decided: July 17, 2002

By a petition for declaratory order accepted for filing on November 13, 2001, Rymes Heating Oils, Inc. (Rymes), seeks a declaration that it is entitled to receive competitive service from the New England Central Railroad, Inc. (NECR), in addition to the service it now receives from Springfield Terminal Railway Company (ST), because: (1) Rymes should not be considered an existing shipper or facility to be served exclusively by ST under the trackage rights terms and conditions imposed by the Board's predecessor, the Interstate Commerce Commission (ICC), in a decision served on February 6, 1990;<sup>1</sup> or (2) even if Rymes were found to be an existing shipper or facility, ST breached the ICC-imposed terms and conditions and thus has lost its exclusive right to serve Rymes. In a decision served on December 31, 2001, a declaratory order proceeding was instituted to resolve the controversy and uncertainty over the ICC-imposed terms and conditions. A procedural schedule was set and, in accordance with that schedule, Rymes filed a supplemental opening statement, ST filed a reply, and Rymes filed a rebuttal statement.<sup>2</sup>

BACKGROUND

Rymes sells and distributes propane to residential, commercial, industrial and government customers located in central and southern New Hampshire. Its distribution facilities are located on the Connecticut River Line (Conn River Line), near Claremont Junction, NH. Rymes is currently served only by ST, but wants to receive service from NECR. NECR owns the Conn River Line and may operate over it subject to the trackage rights of ST.

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<sup>1</sup> See Amtrak—Conveyance of B&M in Conn River Line in VT & NH, 6 I.C.C.2d 539 (1990) (Amtrak II). The terms and conditions are set forth in the Appendix to the decision at 559-67.

<sup>2</sup> The due date for Rymes to file its rebuttal statement was extended by a decision served on February 6, 2002.

ST's trackage rights stem from a 1988 ICC decision authorizing the National Railroad Passenger Corporation (Amtrak) to acquire the Conn River Line from Boston and Maine Corporation (B&M) subject to trackage rights that would allow B&M to exclusively serve its existing customers. In the same decision, the ICC granted Central Vermont Railway, Inc. (CV), an exemption to acquire the Conn River Line from Amtrak and operate it subject to the B&M trackage rights. The ICC directed the parties to privately negotiate the B&M trackage rights.<sup>3</sup>

CV acquired the Conn River Line and entered into an interim trackage rights agreement, but when the parties were unable to agree upon the final terms and conditions of the B&M trackage rights, CV petitioned the ICC to set the terms. In Amtrak II, the ICC imposed trackage rights terms and conditions.<sup>4</sup> Under section 1.3 of the terms and conditions,<sup>5</sup> B&M obtained the exclusive right to serve all existing shippers and shippers' facilities that were located on the Conn River Line and that received or tendered rail shipments during the 12 months prior to the line's conveyance to CV on September 9, 1988 (Conveyance Period).<sup>6</sup> B&M's exclusive right to serve such shippers — which, according to the terms and conditions, included any and all new shippers that located at such existing facilities on the Conn River Line after September 9, 1988 — was expressly conditioned on B&M making available, at a minimum, 3-day per week service,<sup>7</sup> and consulting with the shippers to ensure that their needs were being met. Under section 1.4, CV and B&M could compete to serve new shippers and facilities.<sup>8</sup>

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<sup>3</sup> See Amtrak—Conveyance of B&M in Conn River Line in VT & NH, 4 I.C.C.2d 761, 804-06 (1988) (Amtrak I).

<sup>4</sup> See supra note 1.

<sup>5</sup> Amtrak II, 6 I.C.C.2d at 560.

<sup>6</sup> Section 1.3.1 defines existing shippers and shippers facilities' as industries and facilities at rail sidings which received or tendered rail shipments during the Conveyance Period.

<sup>7</sup> Section 1.3.2 defines 3-day per week service as the provision of local set-off and pick-up service to shippers on the Conn River Line at least 3 days per week in each direction.

<sup>8</sup> These included: (a) shippers and shippers' facilities located on the Conn River Line that had not received or tendered rail shipments during the Conveyance Period; (b) any other new shippers on the Conn River Line; and (c) any existing shippers and shippers' facilities for which B&M had not provided a minimum 3-day per week service. Amtrak II, 6 I.C.C.2d at 560.

In 1994, the ICC approved NECR's acquisition of CV's interest in the Conn River Line, subject to B&M's trackage rights.<sup>9</sup> According to Rymes, the acquisition was consummated in 1995. Previously, ST had succeeded to the interest of B&M's trackage rights over the Conn River Line and its obligations and benefits under the terms and conditions, pursuant to the leases and trackage rights described in a 1988 ICC decision.<sup>10</sup>

In 1995-96, Rymes constructed its propane distribution facilities (Distribution Center) near the Conn River Line. Before the construction of the Distribution Center, there were no tracks or other structures on the property. Rymes built a new 650-foot track across its property to connect its Distribution Center to track at a steel manufacturing facility, leased by Eastern Bridge LLC (Eastern Bridge), which had received and tendered shipments during the Conveyance Period.<sup>11</sup> Rymes' Distribution Center received or tendered its first shipment by rail in November 1996. Before that, Rymes had not used rail transportation in the vicinity.

## DISCUSSION AND CONCLUSIONS

Preliminary Matters. As a preliminary matter, ST argues that Rymes does not have standing to seek relief under section 9.4(iii) of the terms and conditions because the agreement<sup>12</sup> "is not intended to

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<sup>9</sup> See New England Central Railroad, Inc. – Acquisition and Operation Exemption – Lines Between East Alburgh, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994).

<sup>10</sup> See D&H Ry-Lease & Trackage Rights Exempt. Springfield Term., 4 I.C.C.2d 322 (1988). B&M and ST are both subsidiaries of Guilford Transportation Industries, Inc. Under section 9.8 of the trackage rights terms and conditions, B&M had the right to assign any or all of its rights and obligations under the agreement to any of its affiliates following consultation with CV. Amtrak II, 6 I.C.C.2d at 567.

<sup>11</sup> In 1995, the tracks to the Eastern Bridge facility (formerly occupied by East Coast Steel) were removed, except for a short section connecting to the switch at the Conn River Line, and new tracks were built behind the Eastern Bridge facility. The track constructed by Rymes connects to this new track.

<sup>12</sup> The term Agreement is defined in Amtrak II as "the terms and conditions of trackage rights as a whole set forth herein, as though the instant terms and conditions had been agreed to contractually by B&M and CV." 6 I.C.C.2d at 559.

inure to the benefit of any party not a party to this Agreement.”<sup>13</sup> ST also asserts, without support, that the Board lacks jurisdiction to grant relief to Rymes. These contentions are meritless. The terms and conditions were intended to preserve B&M’s ability to solely serve shippers that had been previously served by a single carrier over the line, but they were also designed to provide for competitive service on the Conn River Line for other shippers. As a shipper served by the Conn River Line, Rymes is entitled to seek relief under the terms and conditions, and we have jurisdiction to interpret them and to grant whatever relief is appropriate. See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 247 n.15 (1996).

Merits. This declaratory order proceeding was instituted pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721 to resolve the controversy and uncertainty over the ICC-imposed terms and conditions in Amtrak II. We now address the merits of the controversy.

We must first determine whether Rymes is an existing shipper or a new shipper located at an existing facility within the meaning of the terms and conditions. If Rymes is neither, then Rymes is not subject to the exclusivity provisions of the terms and conditions and is entitled to receive competitive service from NECR.

By definition, existing shippers and existing facilities are those that have received or tendered shipments during the Conveyance Period. Because it first tendered a shipment on the Conn River Line in November 1996, well after the Conveyance Period, Rymes is not an existing shipper. And because its Distribution Center was built in 1995-96 on separate property, which previously contained no tracks or facilities, Rymes’ Distribution Center is not an existing facility.

ST recognizes that Rymes built its facility after the Conveyance Period, but ST notes that Rymes connected its new 650-foot track to a portion of a rail siding at which shipments were received or tendered during the Conveyance Period. Because section 1.3.1 of the terms and conditions — which provides that a new shipper locating on the line may be treated like an existing shipper — refers to “industries and facilities at rail sidings which received or tendered rail shipments during the Conveyance Period,” ST argues that Rymes should be treated as a new shipper at an existing facility (and as such entitled to service only from ST).

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<sup>13</sup> Id. at 566.

We disagree. ST's interpretation of section 1.3.1, in our view, is too expansive, and by placing too much weight on the term "on rail sidings,"<sup>14</sup> it would give ST a monopoly for new business, contrary to the agency's intent in Amtrak I and Amtrak II. In Amtrak I, 4 I.C.C.2d at 800, the ICC limited B&M's exclusive trackage rights to customers it served during the Conveyance Period, explaining that "the competitive situation on the line may continue as before with B&M retaining the exclusive right to serve its existing customers." (Emphasis added). And in Amtrak II, 6 I.C.C.2d at 542, in clarifying the parties' Interim Agreement that was ultimately imposed, the ICC described the exclusive service rights given to B&M as "includ[ing] any and all new shippers that locate at existing facilities after the conveyance date." (Emphasis added).

Here, Rymes did not locate at an existing facility. Its operations center was built in a location that had not been previously served by the line. The track to Rymes' facility was constructed in 1995-96, and it connects to track at Eastern Bridge that was constructed in 1995. Thus, neither the track segment connecting to Rymes nor the track to which it connects was in existence during the Conveyance Period. Even if the phrase "received or tendered rail shipments" were construed to refer to "rail sidings," the fact that the track from the Rymes facility ultimately runs to an existing rail siding would not matter, as the connection between the Rymes facility and the rail siding is too remote to support a finding that Rymes located its new operations at the siding.

In sum, we find that Rymes is neither an existing shipper nor a new shipper located at an existing facility within the meaning of the ICC-imposed terms and conditions and, therefore, Rymes is not a shipper to be served exclusively by ST. Rymes is entitled to obtain competitive service from NECR.<sup>15</sup> Having made this finding, we need not reach Rymes' claims of service failures by ST.

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<sup>14</sup> In fact, as we see it, the theory underlying ST's case is flawed. The phrase "received or tendered rail shipments" must refer to "industries and facilities," not "rail sidings," as rail sidings are transportation facilities, not shippers, and thus could not themselves receive or tender shipments. That interpretation is consistent with the proper grammatical use of prepositional phrases, which are used to connect words to show the relation of a noun to some other word. Here, the phrase "at rail sidings" was correctly used to clarify that existing shippers and facilities under section 1.3 of the terms and conditions may also be located on rail sidings, and the phrase "which received or tendered rail shipments during the [Conveyance Period]" qualifies the nouns "industries and facilities," not the prepositional phrase "at rail sidings" describing those nouns. In any event, regardless of how the language is parsed, ST's approach cannot prevail.

<sup>15</sup> In a letter dated July 26, 2001, NECR states that it would like the opportunity to serve Rymes if its business is open to competition.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for declaratory order is granted to the extent specified above.
2. This proceeding is discontinued.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary